

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>STEVEN WILLIAMS,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>TEREX CORPORATION</b>	:	
	:	
<b>and</b>	:	
	:	
<b>GENERAL MOTORS CORPORATION,</b>	:	
	:	
<b>Defendants.</b>	:	<b>NO. 01-3770</b>

**Reed, S.J.**

**November 20, 2001**

**MEMORANDUM**

This products liability action arises out of the alleged faulty design, manufacture and sale of the defendants' Ranger XT-5 Aerial Lifts which resulted in the plaintiff's personal injury. Plaintiff Williams ("Williams") filed suit in the Eastern District of Pennsylvania averring that jurisdiction was proper under 28 U.S.C. § 1332 as the amount in controversy exceeds the sum of \$150,000 and there is diversity of citizenship between the parties. (Compl. ¶ 4.) Presently before this Court is the motion of defendant Terex Corporation ("Terex") to transfer this action to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1404(a). Upon consideration of defendant's motion and plaintiff's response, the motion will be denied.

Transfer under 28 U.S.C. § 1404(a) is possible only if venue is proper in the original forum and federal jurisdiction exists there. See 15 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3844 (2d ed. 1986). The defendant raises the venue issue by seeking this motion for voluntary transfer; however, this Court has some concerns that venue

may not be proper in this district. If venue is improper, transfer, if at all, must be brought under § 1406(a).<sup>1</sup> See Jumara v. State Farm Ins. Co., 55 F.3d 873, 878 (3d Cir. 1995). In order to decide which provision applies to the present case, this Court must first answer the threshold question of whether venue is proper in this district. The general federal venue statute is codified at 28 U.S.C. § 1391, which reads:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) *a judicial district where any defendant resides, if all defendants reside in the same State*, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

...

c) For purposes of venue under this chapter, *a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced*. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

28 U.S.C. § 1391 (emphasis added).

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<sup>1</sup> Terex has not filed a motion under Federal Rule of Civil Procedure 12(b)(3) to dismiss for lack of jurisdiction over the person or improper venue. Federal Rule of Civil Procedure 12(h)(1) provides:

A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Since Terex has failed to raise the jurisdiction issue, it is deemed to be waived. The venue issue has been preserved through the filing of the instant motion.

General Motors has not objected to personal jurisdiction and is therefore deemed a resident of Pennsylvania.<sup>2</sup> Therefore, if there is personal jurisdiction over Terex in the Eastern District of Pennsylvania, both defendants would be deemed to reside in the same state and venue lies here. Under the statute, a corporation may be sued in any judicial district in which it is incorporated, is licensed to do business, or is doing business. See E'Cal Corp. v. Office Max, Inc., Civ. Act. No. 01-3281, 2001 U.S. Dist. LEXIS 15868 (E.D. Pa. Sept. 6, 2001) (collecting cases). Terex is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Westport, Connecticut. (Compl. ¶ 2.) While there has been no proffer to show any contacts by Terex with this district, Terex has failed to raise an objection to personal jurisdiction. Therefore, this Court is left to conclude that, for the purposes of venue, Terex is deemed to reside in Pennsylvania. Since the potential issue of personal jurisdiction has been waived by Terex, venue is proper in the Eastern District of Pennsylvania under 28 U.S.C. § 1391(a)(1).

The requested venue, the District of New Jersey, would also be proper, as defendant has indicated under 28 U.S.C. § 1391(a)(2) since New Jersey is where “a substantial part of the events or omissions giving rise to the claim occurred.” (Mot. ¶ 13.)

Having determined that venue is proper in both the originating and transfer districts, I turn to the appropriate considerations under 28 U.S.C. § 1404(a), which provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” The moving party bears the burden of establishing the need for a transfer by demonstrating that (1) the case

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<sup>2</sup> General Motors filed an answer to the complaint on September 21, 2001.

could have been brought initially in the proposed transferee forum, (2) the proposed transfer will be for the convenience of the parties, (3) the proposed transfer will be for the convenience of the witnesses, and (4) the proposed transfer will be in the interests of justice. See Miller v. CONRAIL, 196 F.R.D. 22, 24-25 (E.D. Pa. July 28, 2000) (citing Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995)) (citing also Richards v. Consolidated Rail Corp., Civ. Act. No. 94-3942, 1994 U.S. Dist. LEXIS 14985 (E.D. Pa. Oct. 14, 1994)). Terex must show that the balance of conveniences weighs “strongly in favor” of transfer. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839 (1947).

The Court of Appeals for the Third Circuit has provided the lower courts with guidance as to the factors which are relevant in such a balancing. The district court must consider both public and private interests. See Jumara, 55 F.3d at 879. The private interests to be considered include: plaintiff’s forum preference as manifested in the original choice; the defendant’s preference; whether the claim arose elsewhere; the convenience of the parties as indicated by their relative physical and financial condition; the convenience of the witnesses - but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum). The public interests include: the enforceability of the judgement; practical considerations that make the trial easy, expeditious, or inexpensive; the relative administrative difficulty in the two fora resulting from court congestion; the local interest in deciding local controversies at home; the public policies of the fora; and the familiarity of the trial judge with the applicable state law in diversity cases. Id. at 879-880; see also Gilbert, 330 U.S. at 508-509.

Defendant argues that this case should be transferred to the District of New Jersey

because all of the events relevant to this action occurred in New Jersey. (Terex Br. at p. 8.)

While it is undisputed that the accident happened in New Jersey, it has not been explained how the scene of the accident is relevant for “convenience” purposes. There is no indication in the record that the jury will need to view the job site or inspect the truck crane in order to render a verdict. In addition, Terex argues that this case should be transferred because the “bulk of the witnesses likely to testify at trial will be residents of New Jersey.” (Terex Br. at p. 9.) Defendant has not identified the specific witnesses who would be inconvenienced, their residence or office locations, the nature of their testimony, or specified how they would be significantly more burdened by traveling to Philadelphia rather than a court in Trenton, approximately 30 miles away.<sup>3</sup> Since defendant has not identified the relevant witnesses, this court assumes that these witnesses will include the plaintiff’s employer, treating physician and co-workers. It should be noted that the Jumara court held that courts should consider the convenience of the witnesses “only to the extent that the witnesses may actually be unavailable for trial in one of the fora.” Jumara, 55 F.3d at 879. Terex has not alleged that these witnesses would actually be unavailable for trial in the Eastern District of Pennsylvania, but has only presented the court with the unsubstantiated conclusion that maintaining this action in this district “would cause enormous expense and greatly inconvenience the parties.” (Terex Br. at p. 9.) Further, since this is a products liability action, it is reasonable to assume that among the witnesses at trial will be representatives of the defendants, as well as engineers and other experts. These corporate witnesses may be located in Michigan (principal place of business of General Motors),

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<sup>3</sup> We take judicial notice of the distance between Philadelphia, Pennsylvania and Trenton, New Jersey, as verified by MapQuest.com.

Connecticut (principal place of business of Terex) or elsewhere throughout the United States.

(Compl. ¶¶ 2-3.) Air travel into Philadelphia International Airport is likely regardless of whether this action proceeds in Philadelphia or Trenton; therefore, I am unpersuaded that potential witnesses will be overburdened by maintaining this action in this district. As our Court of Appeals has admonished, “unless the balance of convenience of the parties is strongly in favor of defendant, the plaintiff’s choice of forum should prevail.” Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970). Thus, the private factors either weigh against transfer or do not weigh in favor of either forum.

Defendant’s have raised no public factors for consideration in their Motion to Transfer and it does not appear that there are any material issues regarding the enforceability of the judgement or other practical considerations which would sway the balance of conveniences in the defendant’s favor.

In summary, I conclude that Terex has failed to meet its burden that this action should be transferred to the District of New Jersey under 28 U.S.C. § 1404(a). Burdens of proof are meaningful elements of legal analysis, and occasionally, when the evidentiary record is wanting, the burden of proof will determine the outcome of a motion. See Simon v. Ward, 80 F. Supp. 2d 464, 472 (E.D. Pa. 2000). An appropriate Order follows.

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<b>TEREX CORPORATION</b>	:	
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	:	
<b>GENERAL MOTORS CORPORATION,</b>	:	
	:	
<b>Defendants.</b>	:	<b>NO. 01-3770</b>

**ORDER**

**AND NOW** this 20<sup>th</sup> day of November, 2001, upon consideration of the motion of defendant Terex Corporation ("Terex") (Document No. 9) to transfer this action to the United States District Court of the District of New Jersey pursuant to 28 U.S.C. § 1404(a), and the response thereto (Document No. 11), and having concluded for the reasons set forth in the foregoing memorandum that Terex has failed to meet its burden in demonstrating that this action should be transferred pursuant to 28 U.S.C. § 1404(a), it is hereby **ORDERED** that the motion of defendant Terex is **DENIED**.

**IT IS FURTHER ORDERED** that defendant Terex shall answer the complaint no later than December 3, 2001.

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LOWELL A. REED, JR., S.J.